**IN THE HIGH COURT OF GUJARAT AT AHMEDABAD**

**SPECIAL CRIMINAL APPLICATION No. 1286 of 2007**

**For Approval and Signature:**

**HONOURABLE MR.JUSTICE M.R. SHAH**

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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**SANTOKBEN SHARMANBHAI JADEJA - Applicant(s)**
**Versus**
**STATE OF GUJARAT - Respondent(s)**

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**Appearance :**

MR ND NANAVATI WITH MR MITESH R AMIN for Applicant(s) : 1,
MR KAMAL TRIVEDI, ADVOCAT GENERAL WITH MR RC KODEKAR ADDL. PUBLIC PROSECUTOR for Respondent(s) : 1,

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**CORAM : HONOURABLE MR.JUSTICE M.R. SHAH**

**Date : 13/08/2007**

**ORAL JUDGMENT**

1. By way of this petition under Article 227 of the Constitution of India, the petitioner – original accused No.1 – Santokben Sharmanbhai

Jadeja has prayed for an appropriate order to quash and set aside the order dated 13.6.2007 passed by the learned JMFC, Junagadh passed below application Mark – 8 granting Narco Analysis Test and Brain Mapping Test of the petitioner. The petitioner has also prayed for an appropriate order to quash and set aside the order dated 30.6.2007 passed by the learned Additional Sessions Judge & Presiding Officer, 4th Fast Track Court, Junagadh passed in Criminal Revision Application No.89 of 2007 in dismissing the same and confirming the order passed by the learned JMFC, Junagadh granting Narco Analysis Test and Brain Mapping Test of the petitioner.

2. At the outset, it is to be noted that against the State so many cases involving serious offences such as Saurabuddin encounter case and others are pending in which the question with regard to Narco Analysis Test and Brain Mapping Test of the concerned accused are pending at different stages i.e. either at the

stage of proceedings before the learned Magistrate or revisional stage before the learned Sessions Court or before this Court and considering timely requirement of such tests at the stage of investigation, considering the above, this Court has considered present petition on merits. The decision of this Court in the present petition have a baring upon the aforesaid proceedings before the different trial Courts / revisional Courts hence, this petition is considered on merits.

It was also brought to the notice of the Court that one proceeding is pending before the Hon'ble Supreme Court and the case is referred to the Larger Bench, and considering the same an opportunity was given to the petitioner to move an appropriate application before the Hon'ble Supreme Court for transfer of the proceedings and twice this Court granted time to the petitioner to move such an application for transfer in view of the pending proceedings before the Hon'ble Supreme Court and in fact on

19.7.2007 at the request of the learned counsel appearing for the petitioner, this petition was adjourned to 1st August, 2007 as the statement was made that the petitioner proposes to move an appropriate application before the Hon'ble Supreme Court for transfer of this proceedings in view of the pendency of some other proceedings raising similar controversy before the Hon'ble Supreme Court. This Court also recorded the statement of the learned counsel appearing for the petitioner that if an appropriate order is not obtained from the Hon'ble Supreme Court, they will proceed further with the present petition. That thereafter, present petition came up for hearing on 1st August, 2007, which was adjourned to 6th August, 2007 and Shri N.D.Nanavati, learned Senior Advocate appearing for the petitioner has submitted that the petitioner does not propose to move an appropriate application before the Hon'ble Supreme Court for transfer of the present proceedings and he would like to submit on merits and that is how,

this Court has heard the learned advocates appearing on behalf of the respective parties on merits and is deciding the present petition on merits.

3. Before dealing with the present petition on merits and the contentions on behalf of the rival parties with regard to need of Narco Analysis Test and/or Brain Mapping Test, few facts are necessary for the determination of the present petition to appreciate the prayer of the Investigating Officer for conducting the Narco Analysis Test and / or Brain Mapping Test of the petitioner.

4. An FIR is registered at Junagadh Taluka Police Station on 13.5.2007 given by one Jyotiben Dilipbhai Pipariya against two accused persons named Mohan Amir Gohil and Mahesh alias Bhaddo Mulji Chauhan for the offence punishable under sections 302, 394, 376 and others of Indian Penal Code and as stated above, the said

FIR is registered on 13.5.2007 being CR No. I – 69 of 2007. It appears that inspite of the best efforts made by the Investigating Agency and the State, those two named accused persons could not be arrested and they are absconding. At this stage it is required to be noted that there is a hue and cry in the public with regard to the aforesaid incident and the offence committed by the accused persons and agitation has taken place on large scale by the public raised alleging inter alia the inaction on the part of the State and the Investigating Agency in not able to arrest the accused persons of the aforesaid FIR. During the course of the investigation of the CR I 69 of 2007 and on the basis of the statement given by the sister of the accused of CR I 69 of 2007 – Mohan Hamir that the said accused persons have contacted and met the petitioner and both of them requested the petitioner to give shelter and accordingly said two persons accused are under her shelter and therefore the FIR is registered on 8.6.2007 at Junagadh B Division

Police Station against the petitioner and four other unknown persons for the offence under sections 212, 506(2) and 114 of the Indian Penal Code and the said complaint is given by the Police Inspector, Crime Branch, Junagadh alleging inter alia that the petitioner has committed offence of harboring and sheltering as well as of criminal intimidation and abetment. That the petitioner came to be arrested and Investigating Officer has produced the petitioner before the learned JMFC, Junagadh and an application seeking police remand for the period of 4 days was submitted which was objected by the petitioner, however, considering the seriousness of the offence alleged, the learned Magistrate by an order dated 10.6.2007 granted police remand of the petitioner upto 11.00 A.M. Of 13.6.2007. The said order was challenged by the petitioner before this Court by way of Special Criminal Application No. 1101 of 2007 and the same was withdrawn as having become infructuous. On expiry of the period of remand on 13.6.2007, an

application for further remand for a period of 3 days was given by the Investigating Officer however, the learned Magistrate by order dated 13.6.2007 rejected the said application seeking further remand. The petitioner submitted an application for bail and simultaneously the prosecuting agency gave an application on 11.6.2007 for taking the petitioner for performing the Brain Mapping Test as well as Narco Analysis Test. The said application was at Mark – 8. The said application came to be objected by the petitioner on the ground which will be referred to hereinafter. The learned JMFC, Junagadh granted the application of the prosecution for taking the petitioner for performing the Narco Analysis Test as well as the Brain Mapping Test vide order dated 13.6.2007. Being aggrieved by the said order, the petitioner gave an application for staying the operation of the said order vide Exh.16 so as to enable the petitioner to challenge the said order before the Revisional Court and the learned JMFC, Junagadh stayed the operation of

the order upto 26.6.2007. Against the order granting Narco Analysis Test and Brain Mapping Test, the petitioner preferred Criminal Revision Application No.2007 in the Court of learned District & Sessions Judge, Junagadh on 18.6.2007. In the meantime, the learned JMFC passed an order to adjourn the hearing of the bail application of the petitioner till the petitioner undertakes Narco Analysis Test and Brain Mapping Test. The petitioner being aggrieved by the said order in defering the hearing of the bail application till the petitioner undertakes Narco Analysis Test and Brain Mapping Test preferred Special Criminal Application No. 1132 of 2007 before this Court and by order dated 29.6.2007 this Court directed the learned JMFC to decide and dispose of the bail application with certain observations. Thereafter the said application was heard by the learned JMFC and the learned JMFC allowed the said bail application and released the petitioner on bail. That thereafter the aforesaid Criminal Revision

Application No. 89 of 2007 filed by the petitioner filed against the order of granting Narco Analysis Test and Brain Mapping Test came to be heard by the learned Sessions Judge who by his judgment and order dated 30.6.2007 dismissed the said Criminal Revision Application and confirmed the order passed by the learned JMFC granting application of the prosecution for taking the petitioner for performing Narco Analysis Test and Brain Mapping Test. Against the order of rejection of the Criminal Revision Application as well as the order passed by the learned JMFC, Junagadh granting application of the prosecution for taking the petitioner for peforming Narco Analysis Test as well as Brain Mapping Test the petitioner – original accused has preferred present Special Criminal Application under Article 227 of the Constitution of India.

5. Shri N.D.Nanavati, learned Senior Advocate appearing for the petitioner has assailed the order passed by the learned JMFC, Junagadh

confirmed by the learned Additional Sessions Judge, Junagadh in granting the application of the prosecution for taking the petitioner for Narco Analysis Test as well as Brain Mapping Test on the following grounds :-

(i) The learned Magistrate has committed serious and grave error in giving direction to the accused for undertaking Narco Analysis Test as well as Brain Mapping Test as the same violates the protection guaranteed under Article 20(3) of the Constitution of India as the order containing the direction given is nothing but to compel the accused to give evidence against herself which is prohibited under Article 20(3) of the Constitution of India.

(ii) The test involve injection of certain solution in the body of the witness and therefore, without the consent of the

petitioner nothing can be injected in the body of the petitioner.

(iii) The petitioner cannot be compelled to give statement which is self-incriminating and as such, such test is not considered as reliable and the drugs sought to be administered to the petitioner – original accused is dangerous to the health of the petitioner.

(iv) The petitioner is charged only for the offence under sections 212 and 506(2) of the Indian Penal Code which are trivial in nature and for which Narco Analysis Test and/or Brain Mapping Test are not required, more particularly, when the FIR is lodged after a long period and the informant is Police Inspector of Criminal Branch.

6. Shri N.D.Nanavati, learned Senior Advocate appearing for the petitioner has vehemently

submitted that in the criminal jurisprudence accepted in India, a person facing an investigation is constitutionally conferred with the right viz. right to remain silent, leaving it for the Investigating Agency to investigate the factual allegations resorting to only those methods which are specifically permitted under various statutory provisions. It is submitted by him that the accused cannot be compelled to be a witness against himself / herself by conducting such Narco Analysis Test and the same would offend the constitutional protection guarantee under Article 20(3) of the Constitution of India. Shri Nanavati, learned Senior Advocate has submitted that there are no statutory provisions in the Criminal Procedure Code or any statutory remedies by which the Investigating Agency can compel the accused to undergo any test including Narco Analysis Test. It is further submitted by him that in the year 2002 the Law Commission of India considered in detail the provisions of Article 20(3) of the Constitution of India in the context of right

of silence given to the accused and has considered whether there is any need or desirability or constitutional permissibility to amend the Criminal Procedure Code so as to temper with the right conferred upon the accused against self – incrimination and the Law Commission of India has filed its Report before the Central Government and the Law Commission has examined the history behind conferment of such a right upon an accused and also examined the pari materia provisions in United Kingdom, Australia, USA, Canada, China and India and after a detailed and a careful consideration, the Law Commission of India found that no amendment in Criminal Procedure Code is necessary and any changes in law relating to silence of the accused, if made, will be ultra-virus to Articles 20(3) and 21 of the Constitution of India. Shri Nanavati, learned Senior Advocate has also further submitted that the question of such test, which results into the accused being compelled to incriminate himself fell for consideration by

the National Human Rights Commission in the context of Polygraph test and the said Commission considered the question of permissibility of a lesser drastic test viz. Polygraph test, which is commonly known as “Lie Detector Test” and it is submitted that in the case of Polygraph test, the National Human Rights Commission prohibited commission of such a test without express and informed consent of the accused. It is submitted that the Commission has laid down guidelines relating to the said test on an accused in context of the constitutional guarantee embodied in part – III of the Constitution of India in general and Article 20(3) of the Constitution in particular. It is submitted that the said guidelines are sent to all the States. Therefore, it is submitted that in light of the above, granting of application for Narco Analysis Test and Brain Mapping Test of the petitioner would be against the protection and guarantee conferred by Article 20(3) of the Constitution of India and the same has also no

statutory force. Shri Nanavati, learned Senior Advocate appearing for the petitioner has relied upon the decision of this Court in case of ***Najabhai Ranchhod and another V/s. State of Gujarat*** reported in **1972 CR.L.J. 1605**. He has also relied upon one another decision of this Court in case of ***Haribhai Chanabhai Vora & Others V/s. Keshubhai Haribhai Vora*** reported in **2005 (2) GLR 1747**. In the said case the question was with regard to conducting of D.N.A. Test. Shri Nanavati, learned Senior Advocate has taken the Court to the Law Commission's Report as well as the guidelines issued by the National Human Rights Commission referred to hereinabove.

7. It is also further submitted by Shri Nanavati, learned Senior Advocate that police remand was given and the petitioner was in police remand and the petitioner has cooperated and nothing incriminating has been found against the petitioner. It is also further submitted that the petitioner is changed only

for the offences under sections 212 and 506(2) of the Indian Penal Code and thus, looking to the offences as alleged, such a drastic measure of injecting foreign chemical against the will of the petitioner is not required. It is submitted that when the allegations are only under section 202 of harboring only the aforesaid two tests are not called for. It is submitted that the nature of offences alleged is a relevant consideration for which such a drastic test is not required. It is also further submitted by him that the method adopted in the commission of crime by one or more accused is also relevant consideration like Telegi's case. It is also further submitted by him that even if all the allegations levelled against the petitioner are considered as gospel truth then also it is not a case for Narco Analysis Test. It is also further submitted by him that identical question / controversy is pending before the Hon'ble Supreme Court and the matter is referred to Larger Bench and therefore, this

Court should wait and/or should not pronounce any judgment in the present case till the controversy is resolved by the Hon'ble Supreme Court and/or the matter is decided by the Hon'ble Supreme Court. It is submitted by him that before the Revisional Court the petitioner has specifically made out a ground with regard to pendency of the proceedings before the Hon'ble Supreme Court but the Revisional Court has not deal with the same at all. It is submitted by him that at least the learned Revisional Court was expected to deal with and consider the same. It is submitted by him that whenever the contention is raised and the submission is made, the Court is bound to consider the same and dealt with the same and the Court cannot just ignore the same and/or do not deal with the same. By making the aforesaid submissions, Shri Nanavati, learned Senior Advocate has requested to quash and set aside the orders passed by both the Courts below and reject the application of the prosecuting agency for Narco Analysis Test and Brain

Mapping Test of the petitioner.

8. Shri K.B.Trivedi, learned Advocate General was called by the Court to assist the Court and he has submitted that at least four High Courts in the country have considered the permissibility of the Narco Analysis Test and Brain Mapping Test on the accused persons and have also considered the submissions and the contentions raised on behalf of the accused persons with regard to the protection guaranteed under Articles 20(3) & 21 of the Constitution of India and all the four High Courts have elaborately considered all the aspects on the point and have permitted the Narco Analysis Test and Brain Mapping Test upon the accused persons. He has submitted that the Division Bench of the Bombay High Court in case of ***Ramchandra Reddy V/s. State of Maharastra*** reported in **2004 ALL MR (Cri)** 1704; The Karnataka High Court in case of ***Smt. Selvi & Others V/s. State by Koramangala Police Station*** decided on 10th September, 2007 in Criminal

Petition No.1964 of 2004; the Bombay High Court in case of ***Arun Gulab Gavali V/s. State of Maharastra*** reported in **2006 Cr.L.J. 2615**; the Madras High Court in case of ***Dinesh Dalmia V/s. State*** reported in **2006 Cr.L.J. 2401;** and the Andhra Pradesh High Court in case of ***K. Venkateshwara Rao, S/o K. Vijaya Simha, Hydrabad V/s. State of A.P.*** Decided on 30th August, 2007 in Criminal Revision Application No.1402 of 2006 have taken a view that by performing / conducting the Narco Analysis Test / Brain Mapping Test on the accused person, at the stage of investigation do not violate the constitutional protection guaranteed under Article 20(3) and 21 of the Constitution of India. It is also further submitted that in all the aforesaid cases, the Courts have also considered the need of such scientific tests by observing that it is a need for the day for such a scientific tests. Learned Advocate General has also drawn the attention of the Court to the relevant materials in favour of conducting of the Narco Analysis Test inclusive

of the guidelines issued by the National Human Rights Commission and the Report of the Law Commission. He has also taken the Court to the order passed by this Court in Special Criminal Application No.1200 of 2003 dated 16.12.2007 in case of ***Malav A. Bhatt V/s. State of Gujarat*** as well as the judgment of the Hon'ble Supreme Court in case of ***Jitubhai Babubhai Patal V/s. State of Gujarat*** reported in ***2005 (10) SCC 545*** and the news report dated 17.7.2007 extracting from the web-site of IndLaw Communications Private Ltd. Pointing out that the Hon'ble Karnataka High Court has allowed one petition against the Narco Analysis Test. Shri Trivedi has submitted that the aforesaid submissions are only to be construed as his own opinion with a view to assist the Hon'ble Court and may not be construed as opinion and/or policy of the State.

9. Shri R.C.Kodekar, learned APP appearing on behalf of the State has opposed the present petition. It is submitted that considering the

provisions of the Criminal Procedure Code, more particularly, sections 156 to 159, the Investigating Agency of the State has statutory right to investigate the case and Narco Analysis Test and the Brain Mapping Test and other tests are scientific tests, which are now the part of the investigation process and therefore, merely because, the petitioner does not give the consent for the said tests, the Investigating Officer should not be restrained from conducting such tests which is necessary for the purpose of finding out the truth and to nab the accused. It is also further submitted that as there were hue and cry made against the third degree during the investigation such a scientific test is required to be performed on the accused. It is ultimately for the Investigating Officer and/or the prosecuting agency to consider the nature of test required for further investigation. It is also further submitted by him that as held by the Hon'ble Supreme Court in various decisions, Investigating Agency is the master of the

investigation and nobody can interfere with the same inclusive of the Magistrate till the appropriate report is submitted after investigation as required and contemplated under the provisions of the Criminal Procedure Code i.e. sections 169 and / or 173. It is also further submitted by him that when after exploring all the options such a custodial interrogation of the petitioner, etc. when the Investigating Officer is still in dark and is not able to reach to the accused persons and find out the truth, and the petitioner is not telling the truth for investigation in the right direction, Brain Mapping Test and Narco Analysis Test of the petitioner is required and therefore it is requested to dismiss the present application. It is submitted by him that it is not that straight away the prosecuting agency applied for the Narco Analysis Test and/or Brain Mapping Test. Only after it is found that there is no alternative, for further investigation in a right direction, application was given for Narco Analysis Test

and Brain Mapping Test of the petitioner. Meeting with the submission on behalf of the petitioner that the petitioner is charged only for the offences under sections 212 and 506(2) of the Indian Penal Code and for which such tests are not called for, it is submitted that even as per the learned counsel appearing on behalf of the petitioner the nature of the offences alleged is a relevant consideration and in the present case what is required to be considered is not an allegation with regard to section 212 of the Indian Penal Code but further allegations are also required to be considered. It is submitted by him that the allegations against the petitioner are that the petitioner has committed offence of harboring and sheltering the two accused persons who are involved in the serious offence under sections 302, 394 and 376 and others of Indian Penal Code. It is submitted that a girl was murdered by the accused after committing rape upon her and the said accused persons are absconding and the allegations against the petitioner are that

she has harbored and sheltered those two accused persons. It is submitted by Shri Kodekar that if the Narco Analysis Test and the Brain Mapping Test are allowed to be performed / conducted upon the petitioner, in that case, the Investigating Agency might get some clue which can be helpful to the Investigating Officer / Investigating Agency to further investigate the case and help the Investigating Officer / Investigating Agency to find out those accused persons. Therefore, it is submitted that the allegations against the petitioner for the offence under section 212 of the Indian Penal Code are required to be considered in light of the offence committed by those persons to whom the petitioner has given shelter and harbor. It is also further submitted by him that four different High Courts in the country have considered all the submissions which are made on behalf of the petitioner and have permitted the Narco Analysis Test and Brain Mapping Test upon the accused persons by observing that it does not

violate the protection guaranteed under Articles 20(3) and 21 of the Constitution of India. It is also further submitted by him that it is not required to be considered at this stage whether the statement of the accused persons which would be recorded during the course of the Narco Analysis Test can be used against the petitioner. According to him, that stage has not come and what is evidentiary value of the statement made during the Narco Analysis Test that is required to be considered only at the time of trial and/or at the time when the same is likely to be used against the accused. It is submitted by him that as stated above the requirement of Narco Analysis Test and Brain Mapping Test is only for further investigation of a serious crime. Under the circumstances, it is requested to dismiss the present application.

10. Heard the learned advocates appearing on behalf of the respective parties.

11. Before considering and dealing with the submissions and contentions made on behalf of the rival parties, it is required to be considered that what are the Brain Mapping Test and Narco Analysis Test and the safeguards taken during the aforesaid tests. At the outset, it is to be noted that what are the aforesaid tests and what are the safeguards taken at the time of performing / conducting of the aforesaid tests are already considered by the Bombay High Court, Karnataka High Court and Andhra Pradesh High Court. The learned counsel appearing on behalf of the State and the learned Advocate General have also produced on record certain materials what are the aforesaid tests and which measures / safeguards are undertaken while conducting / performing the aforesaid tests and considering the above, it is found as under :-

**NARCO ANALYSIS TEST** :-

The Narco Analysis Test is conducted by administrating 3 gms of Sodium Pentathol or

Sodium Amytal dissolved in 3000 ml of distrilled water depending upon the person's sex, age, health and physical condition and this mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of an anaesthetist. The rate of administration is controlled to drive the accused slowly into a hyponotic trance. The effect of the bio-molecules on the bio-activity of an individual is evident as the drug depresses the central nervous system, lowers blood pressure and slows the heart rate, putting the subject into a hypnotic trance resulting in a lack of inhibition. The subject is then interrogated by the Investigating Agency in the presence of the doctors. The revelations made during this stage are recorded both in video cassettes. The report prepared by the experts is what is used in the process of collecting evidence. Under the influence of the drug the subject talks freely and is purportedly deprived of his self-control and will power to manipulate his answers. The

underlying theory is that a person is able to lie by using his imagination. In the Narco Analysis Test, the subject's imagination is neutralized and reasoning faculty affect by making him semi-conscious. The subject is not in a position to speak up on his own but can answer specific and simple questions. In this state it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of. His answers are spontaneous as a semi-conscious person is unable to manipulate his answer. Injected in continuous small dosages it has a hypnotizing effect on a person whop responds loquaciously when questioned. The ECG and blood pressure are monitored continuously throughout the testing procedure. The entire conduct of the procedure is video graphed. The questions are designed carefully and are repeatedly persistently in order to reduce the ambiguities during drug interrogation. After the Narco examination is over the suspect is made to relax for 2 – 3 hours.

**WHAT IS BRAIN MAPPING TEST :-**

The Brain Mapping Test is also known as P-300 test. In this test of Brain Mapping the suspect is first interviewed and interrogated to find out whether he is concealing any information. The activation of brain for the associated memory is carried out by presenting list of words to the subjects. There are three types of words in the list used for Brain Mapping test, Part – I consisted of neutral words, which have no direct relationship with the case. Part – II consists of probe words directly related to the case and suspects to elicit concealed information, which all suspects have had opportunity to come to know during the course of events related to the case. Part – III consists of target, which are not part of the first two parts. The words in this part are based on confidential findings which suspect does not know. The recording of this test is done by acquiring the response

through 32 channel EEG-ERP Neuro Scan cording system. It is carried out by asking the suspect to sit down and close his eyes. The 32 channel electrodes are placed over the scalp directly. While conducting this test twice by presenting each word in three parts randomly. The suspect is instructed to relax and listen to the words presented in the auditory mode. This test does not expect any oral response from the witness. The conclusion drawn by the experts after the conduct of the test to indicate the possession of the knowledge about the relevant subject which is helpful in the investigation and collection of evidence. After the administration of the test, what comes out is that, the person undergoing the test has the knowledge of the crime about which he was questioned (brain mapping). In the said test there is no way to find out what the lie is or what is the information stored in the brain of the person concerned. It can be called the information received of taken out from the witness.

12. **NEED FOR NARCO ANALYSIS TEST AND BRAIN MAPPING TEST AND THE ADVANTAGES OF THE AFORESAID TESTS:** -

The field of criminology has expanded rapidly during the last few years and the demand for supplemental methods of detecting deception and improving the efficiency of interrogation have increased concomitantly. The Investigating Agency has statutory right to investigate the crime and to find out the truth and to reach to the accused. Narco Analysis Test for criminal interrogation is valuable technique which would profoundly affect both the innocent and the guilty and thereby hasten the cause of justice. The Investigating Agency cannot be prevented to interrogate the case at the stage of investigation relating to crime in which he is shown as accused. If the aforesaid two tests are permitted, it would assist t he Investigating Agency in finding out the truth and find out the real culprit of the commission

of an offence. When the Investigating Agency is absolutely in dark and after all efforts and exhausting all the alternatives still there is no further headway in the investigation, the aforesaid two tests would help the Investigating Agency to further investigate the crime and during the course of the aforesaid two tests and/or after completion, the Investigating Agency may get some clue and may be able to further investigate the crime and reach to the real accused / culprit who has committed offence. Accusations are made against the Investigating Officer using third degree methods to extract information from the accused and therefore there is a need to have such scientific tests. The scientific tests like polygraph test; P-300 test are like taking MRI or CT Scan and when the accused are not coming forward with the truth, the scientific tests are resorted to by the Investigating Agency to find out the truth and to have a further clue in the matter to further investigate the crime. Such scientific tests are prayed only as a last

resort after exploring all the alternatives and when the Investigating Agency is not in a position to reach the accused and find out the truth. If the nature of the offence alleged to have been committed by the accused coupled with the circumstances under which it is committed affords reasonable grounds for believing that an examination of the person will afford evidence as to the commission of the offence then such tests are necessary. It is a right of the Police Officer under the provisions of the Criminal Procedure Code to investigate the crime and collection of the evidence by the Police Officer is permissible under the law. Conducting of Narco Analysis Test and Brain Mapping Test on the accused are in process of collection of such evidence by the Investigating Agency. Section 161 of the Criminal Procedure Code enables the police to examine the accused also during the investigation. It is the duty of every person to furnish information regarding offence and it is the duty of every citizen / person to assist

the State in detection of crime and bringing the criminals to justice. It is a statutory duty of every witness / person, who has knowledge of the commission of the crime to assist the State in giving evidence. The investigation of the crime on the scientific line is to help the Investigating Agency so as to enable collection of evidence to prove the guilt or innocence of the person accused of committing crime as the modern community requires modern scientific methods of crime detection, lest the public go unprotected.

13. Now, considering above, what is required to be considered is whether conducting / preforming of the Narco Analysis Test and Brain Mapping Test upon the accused infringe the constitutional protection guaranteed under Articles 20(3) & 21 of the Constitution of India or may tantamount to testimonial compulsion and/or would amount to compulsive testimony.

14. Identical question came to be considered by the Division Bench of the Bombay High Court in case of ***Ramchandra Ram Reddy*** (supra) and after considering the entire scheme and provisions of Article 20(3) and Article 21 of the Constitution of India and the nature of the tests and the use of the said tests, the Division Bench of the Bombay High Court has held that so far as Brain Mapping Test – P300 test is concerned, protection given by Article 20(3) cannot be made applicable as there will not a statement during such test and the same cannot said to be incriminatory in nature. So far as conducting / performing of the Narco Analysis Test is concerned, it is held by the Division Bench of the Bombay High Court in the said decision that the statement which is recorded during the course of the Narco Analysis Test unless it is shown to be incriminating the person making it, it does give rise to the protection under Article 20(3) of the Constitution of India and as and when the Investigating Agency uses such

statement as evidence, the said contention is required to be considered. The relevant observations of the Division Bench in the said decision are as under :-

> ***"Para – 20 :- We have therefore no hesitation in holding that <u>Brain Mapping / P-300 or Lie Detector / Polygraph tests</u> can be administered to any accused or a witness. There is no statement coming out of the involuntary tests, and the conclusions which come out of such tests are not statements, the conclusions are not proved in any manner to be even likely to be incriminating to the maker of it, the expert can very well depose as an expert in relation to the tests in court that the Brain Mapping of the accused or the witness discloses existence of knowledge about a crime in the brain of those persons undergoing the tests. What that information is nobody is going to say or anybody can say and therefore there is no question***

***that even the statement coming via expert is incriminatory. The protection given by Article 20(3) gives protection from compulsory testimony, it therefore cannot apply to these two tests. We therefore reject all the contentions in relation to these two tests.***

***"Para – 21 :- That takes under section to the third test which is called as <u>Narco Analysis (Truth Serum Test).</u> We stated above that in this test the person to whom it is administered does make a statement as stated above. It undoubtedly is a statement. The question which falls for consideration therefore, is whether such statement can be forcibly taken from the accused by requiring him to undergo the Truth Serum Test against his will. It will be seen that such statement will attract the bar of Article 20(3) only if it is inculpating or incriminating the person making it. Whether it is so or not can be***

***ascertained only after the test is administered and not before. In our opinion therefore, there is no reason to prevent administration of this test also because there are enough protections available under the Indian Evidence Act, under Criminal Procedure Code and under the Constitution (Article 20(3), to prevent inclusion of any incriminating statement if one comes out after administration of the test.***

***Para 22 :- We have to look at this aspect of holding test in a vary broad prospective. The protection or the cover granted by the fundamental right appearing in Clause (3) of the Constitution is complete and invariable. The question is what is sought to be provided by guaranteeing such right and it is undisputed that what is sought to be protected is the protection of human rights and dignities. It is also to be considered***

***in the light of other equally important provisions of the Constitution. Article 51(A) which has been added to the Constitution by subsequent amendment provides via clause (1) which says that it shall be the duty and the duty cannot be properly done by the State, if unnecessarily large protection is spelt out from other provisions like Article 2-(3). Prevention of crime is a sole prrogative of the State and the punishment of the crime if proved is also the duty of the State. Feters on these duties can be put only in extreme cases where the protection of fundamental rights weigh more than the fundamental duty casts on the State. However we need not further dialate on this aspect for the reason that in our opinion administration of these tests against the will of the person to whom it is sought to be administered does not violate the guarantee of Article 20(3) as in the first two cases it is not a statement and that is***

***not incriminatory in any manner. It is the last case where it is a statement and unless it is shown to be incriminating to a person making it, it does not give rise to the protection under Article 20(3). The petitions are premature in relation to the third test. In so far as the first two tests are concerned as aforesaid these tests do not violate any protection.***

***Para – 23 :- It will be seen that in our opinion the first two tests do not result in any incriminating material, they do not result in any statement containing such material and, therefore, does not in any way violate Article 20(3). In so far as the third test is concerned enough protection exists, recourse to which can be taken if and when the investigating agency seeks to introduce such statement as evidence. We need not therefore consider the contention in relation to the time when the right or protection given by Article 20(3) starts.***

***In our opinion, we also need not consider several judgments cited at the bar which relate to scope and extent of Article 20(3). The judgment in MANU/SC/0018/1954, Sharma's case the Supreme Court laid down what is the extent of guarantee under Article 20(3). It was then explained by 11 Judges Bench in Kathi Kalu's case what exactly is the protection. The law has been ultimately crystalised by the Supreme Court in the case of Nandini Satpathy. In all these cases, what came up for consideration, was obviously a statement made by the witness which obviously was incriminating and therefore the scope was accordingly considered by the Supreme Court of India. In the present case we have came to the conclusion that it is not a statement in relation to the first two tests and in relation to the third test it is a statement entry of which in evidence is adequately protected by various provisions of law and therefore we need not***

***consider this and other cases stated at bar"***

**15.** The aforesaid controversy is also considered by the Karnataka High Court in case of ***Smt. Selvi & Ors.*** (supra) and the Karnataka High Court has also considered the need for Brain Mapping Test and Narco Analysis Test and the Karnataka High Court has also considered the submissions made on behalf of the accused that to appear for undergoing Narco Analysis Test would violate his fundamental rights under Article 20(3) of the Constitution of India and would compel the accused to give evidence against himself, which is prohibited under Article 20(3) of the Constitution of India and after elaborately considering various provisions of the Constitution of India as well as the Criminal Procedure Code and considering what are the aforesaid tests and what safeguards are taken, the Karnataka High Court has permitted to conduct / perform the Narco

Analysis Test and Brain Mapping Test on the accused. The relevant observations of the Karnataka High Court in the said decision are as under :-

> *"It was vehemently argued for the accused that the learned Magistrate committed a serious and grave error in giving directions to the accused to appear for undergoing Narco-analysis Test as the same violates their fundamental right guaranteed under Article 20(3) of the Constitution. According to him, the order containing the directions given is nothing but compelling the accused to give evidence against themselves, which is prohibited under said Article 20(3) of the Constitution.*
>
> *Para – 7 :- The term narco-analysis was introduced in 1936 for the use of narcotics to induce a trance like state wherein the person is subjected to various queries. The*

***material (literature) produced shows that in the Narco-analysis Test conducted under medical supervision, an accused will be injected with Sodium Pentathol or Sodium Amytal and thereafter the accused will be subjected to interrogation by the investigating agencies in the presence of expert doctors. But, this will be only after carrying out a detailed medical examination of the accused. If accused is found medically fit to undergo the procedure, then only it will be done, otherwise not. After finding an accused medically fit to undergo the test, the accused will be administered small doses of intravenous infusion of sodium pentathol.***

***Para – 8 :- Sodium Pentathol is the most commonly used drug as an induction agent for general anesthesia routinely contemplated in most of the surgeries and the psychiatrists routinely use sodium pentathol in the diagnosis of mental***

***illness and/or to evaluate the psychological realities. Under the influence of the drug, the patient talks freely and is purportedly deprived of his self-control and will power to manipulate his answers. This is because, few drugs are known to relax individual's defence so that unknowingly the person reveals the truth, which he has been trying to conceal.***

***Para – 9 :- So, during the search for effective aids to interrogation, which is probably as old as man's need to obtain information from an unco-operative subject, more recently, police officials in some countries have turned to the assistance of such drugs in the interrogation of unco-operative accused persons. The investigating agency uses such drug (of its choice) for getting information from persons/accused from their subconscious level at which it may be difficult for accused to lie. This is said to be due to***

***lack of inhibition produced by the drug and the accused talks freely and respond truthfully to verbal questions. Thus, the use of such drug in police work/interrogation is similar to the accepted psychiatric practice of Narco-analysis and the only difference in the two procedures is the difference in the objectives. But the question is, whether, as a scientific technique in investigations, Narco-analysis Test on an accused could be permitted? In other words, the issue is, whether administration of drug to an accused against his consent or wishes during Narco-analysis Test amounts to compulsion?***

***Para – 11 :- It was vehemently argued for the accused that administering i.e., injecting the drug to accused without their consent or against their wishes amounts to "compulsion" attracting Article 20(3) as it causes injury, may be slight.***

*Para – 12 It is true that causing some pain by injecting drug may technically amount to hurt as defined under Section 319 of the Indian Penal Code. But such pain could be caused even when blood sample is drawn for the purpose of its test. So also, by the use of emetic when a culprit is suspected to have swallowed some stolen article. However, for such purposes, the law permits use of necessary force, as is clear from Section 53(1) of the Code of Criminal Procedure, which is as under:*

*"53. Examination of accused by medical practitioner at the request of police officer.--(1) When a person is arrested on a charge of committing an offence of such a nature and alleged to have been committed under such circumstances that there are reasonable grounds for believing that an examination of his person will afford evidence as to the commission of an offence, it shall be lawful for a registered*

***medical practitioner, acting at the request of a Police Officer not below the rank of sub-inspector, and for any person acting in good faith in his aid and under his direction, to make such an examination of the person arrested as is reasonably necessary in order to ascertain the facts which may afford such evidence, and to use such force as is reasonably necessary for that purpose."***

***(emphasis supplied)***

***Para – 13:- It appears that under the old Code, there was no specific provision authorising the police officer under which an arrested person could be subjected to medical examination without his consent. Therefore with an intention to remove that lacuna this new provision was incorporated in the new Criminal Procedure Code, with the sole intention of facilitating effective investigation. Section 53 authorises investigating machinery to get***

*an arrested person examined by a medical practitioner. Section 54 confers such a right upon the accused himself This examination is contemplated under certain conditions. If the nature of the offence alleged to have been committed by the accused coupled with circumstances under which it is committed affords reasonable grounds for believing that an examination of his person will afford evidence as to the commission of the offence, then it has been made lawful for the registered medical practitioner to act at the request of the Police Officer, not below the rank of sub-inspector and to carry out examination of the person arrested in order to ascertain the facts which may afford evidence and for that purpose to use such force as may be necessary. This examination has to be carried out by a registered medical practitioner or any person acting in good faith in his aid and under his direction. It cannot, therefore, be said that merely*

***because some pain or discomfort is caused (in injecting the drug), such a procedure (test) should not be permitted.***

***Para – 15 :- It is true in Narco-analysis Test, nothing is extracted from the body of accused nor anything is compared nor tallied since what is obtained is statement or information given by the accused. Such statement made or information given by an accused will be either exculpatory or inculpatory and it is only inculpatory statement which is hit by Article 20(3) of the Constitution. Whether the accused make inculpatory or exculpatory statement will be known only after the test is conducted and not before that. So, it is premature to say the nature of statement or information, which the accused give under Narco-analysis Test.***

***Para – 16 :- Now reference can be had to***

*Section 156(1) of the Code of Criminal Procedure. It says that any officer-in-charge of a police station may, without the order of a Magistrate, investigate any cognizable case which a Court having jurisdiction over the local area within the limits of such station would have power to inquire into or try under the provisions of Chapter XIII. Admittedly, the offence punishable under Section 302 of the Indian Penal Code is a cognizable offence. So, said provision comes to the aid of investigating agency for investigation. "Investigation" as defined in Section 2(h) of the Criminal Procedure Code includes all the proceedings under the Code of Criminal Procedure for the collection of evidence conducted by a Police Officer or by any person (other than a Magistrate) who is authorised by a Magistrate in that behalf. Thus, collection of evidence by Police Officer is permitted under law. Conducting Narco-analysis Test on accused is in the*

***process of collection of such evidence by the investigating agency.***

***Para – 18 :- It is true that permission of Court or Magistrate is not necessary for investigation into a cognizable offence as is clear from Section 156(1) of the Criminal Procedure Code. For conducting Narco-analysis Test, the investigating agency necessarily requires expert Doctors as without that, such test cannot be conducted. Ordinarily, experts or doctors want an order of the Court when they have to assist the investigating agency in the investigation. Section 53 of the Criminal Procedure Code only says that it shall be lawful for a registered medial practitioner to make examination of an accused when requested by Police Officer. That apart, the report on polygraphy test, advises to subject the accused to Narco-analysis Test after obtaining permission from the Court. Under Section 156(3) of the Criminal***

***Procedure Code, a Magistrate empowered under Section 190 of the Criminal Procedure Code may order for an investigation referred to in Section 156(1) of the Criminal Procedure Code. So and when the word investigation includes collection of evidence by the I.O., if an investigating agency had sought permission from the Court without referring provision, it cannot be termed as unwarranted or bad in law. So, I do not find any force in the argument advanced for the accused.***

***Para – 19 :- At this stage, reference can also be had to Section 161 of the Criminal Procedure Code, with specific reference to Section 27 of the Indian Evidence Act, 1872. In the case of Smt. Nandini Satpathy v. P.L. Dani, MANU/SC/0139/1978, a Bench of three Hon'ble Judges of the Supreme Court has held that Section 161 of the Criminal Procedure Code enables the police to examine an accused also during***

***investigation. So, questioning accused during investigation is permissible subject to certain conditions made clear in the said judgment.***

***Para – 20 :- It cannot be forgotten that Section 39 of the Criminal Procedure Code casts a duty upon every person to furnish information regarding offences. Criminal justice system cannot function without the cooperation of the people. Rather, it is the duty of every person to assist the State in the detection of the crime and bringing criminal to justice. Withholding such information cannot be traced to the right to privacy, which itself is not an absolute right. In this regard, reference can be had to a recent decision of the Supreme Court in the case of State v. Dharmapal, 2003 AIR SCW 1960 : AIR 2003 SC 3450 and observed by the Supreme Court in the case of State of Gujarat v. Anirudha Singh, MANU/SC/0749/1997, that it is the***

***statutory duty of every witness, who has the knowledge of the commission of the crime, to assist the State in giving evidence.***

***Para – 23 :- The right guaranteed under Article 20(3) of the Constitution is in the protection of human rights and dignities, which may need consideration in the light of other equally important provisions of the Constitution. It need not be said that prevention of crime and punishment for the crime are the duties of the State. Fetters on these duties can be put only in extreme cases where the protection of fundamental rights weigh more than the fundamental duty casted on the State. Section 53 of the Criminal Procedure Code has been brought on statute book to have efficient and scientific investigation. It is intended to help the investigation of the crime on the scientific lines so as to enable collection of evidence to prove the guilt or innocence***

*of the persons accused of committing the crime as the modern community requires modern scientific methods of crime detection, lest the public go unprotected. Further, in the process of obtaining information, i.e., collection of evidence during investigation, if any legal or fundamental right of the accused is infringed or violated, nothing prevents them from resorting to the safeguards provided to them under various laws. But that cannot be a ground to refuse to answer during investigation.*

*Para – 30 :- It was also contended for the accused that the first accused is suffering from heart problem and as such, subjecting her to undergo Narco-analysis Test will be detrimental to her health. It may be noted that the accused 1 had undergone Brain Mapping and Polygraphy Tests, admittedly. Further, as noted already, before subjecting an accused to Narco-analysis*

***Test, his/her medical fitness will be ascertained and thereafter only accused will be subjected to Narco-analysis Test. Reference can also be had to the conclusion found in "A report on Narco-analysis Test" submitted by the prosecution under the signature of the Director of Forensic Science Laboratories (Police Department), Madiwala, Bangalore, which is as under:***

**"It should be unambiguously mentioned at this stage that the dosage level required to take a person to the hypnotic stage is found to be 3-4 times smaller than those required for stages beyond. Therefore, this low concentration of the drug used in the Narcosis/Narco analysis will not have any adverse effect on any system of the body."**

***So, the argument cannot be upheld though, of course, necessary care-precaution requires to be taken.***

***Para – 31 :- It be gain said that test***

***permitted by the impugned order assists the investigating agency in getting the truth and find out the real culprit for the commission of the murder of deceased Shivakumar and as such, it may even show innocence of accused. For the aforesaid reasons and discussion made, it is held at this stage that the impugned order does not violate the Article 20(3) of the Constitution."***

In ***Dinesh Dalmia V/s. State*** reported in ***2006 Cri.L.J. 2401,*** the Madras High Court in paras – 14 and 17 observed as under :-

"***Para – 14 :- Huge amount has allegedly been misappropriated by the accused and the investigating agency is completely in the dark as to the end use of such a huge amount siphoned off by the accused. The Investigating Officer did not use third decree methods to extract incriminating***

*materials through the mouth of the accused. Only a scientific test on the accused is prayed for by the respondent – complainant. That the accused will face health hazard and his physical frame will be endangered if he undergoes such scientific tests are totally without any scientific basis. As rightly pointed out by the learned counsel for the respondent, the scientific tests are are like taking MRI or CT Scan. The scientific value of such tests and the credibility thereof will have to be evaluated only during the course of trial. Unless such tests are conducted, the Investigating Agency may not be in a position to come out with clinching testimony as against the petitioner. Subjecting an accused to undergo such scientific tests will not amount to breaking his silence by force. He may be taken to the laboratory for such tests against his will, but the revelation during such tests is quite voluntary. Therefore,*

***such process does not amount to compelling a witness to give evidence as against him.***

***Para – 17 :- As the accused had not allegedly come forward with the truth, the scientific tests are resorted to by the Investigating Agency. Such a course does not amounts to testimonial compulsion. When there is a hue and cry from the public and the human rights activists that the investigating sleuths adopt third degree methods to extract information from the accuse, it is high time the investigating agency took recourse to scientific methods of investigation. The learned Additional Chief Metropolitan Magistrate, Egmore, Chennai, has granted the relief as prayed for by the respondent herein to secure the ends of justice. Therefore, there is no warrant for upsetting the order passed by the Court below."***

**16.** Now, in the backdrop of above, it is required to be considered by this Court whether performing / conducting of the Narco Analysis Test and/or Brain Mapping Test on the accused by itself would amount to violation of protection guaranteed under Article 20(3) of the Constitution of India. It is also required to be considered that at what stage the protection guaranteed under Article 20(3) of the Constitution of India is required to be considered. Article 20 of the Constitution of India reads as under :-

> ***Article – 20 :- Protection in respect of conviction for offences :-***
>
> ***(i)No person shall be convicted of any offence except for violation of the law in force at the time of the commission of the act charged as an offence, nor be subjected to a penalty greater than that which might have been inflicted under the law in force at the time of the commission of the offence.***

***(ii)No person shall be prosecuted and punished for the same offence more than once.***

***(iii)No person accused of any offence shall be compelled to be a witness against himself.”***

Now, it is the contention on behalf of the petitioner – accused that conducting / performing of the aforesaid two tests would be testimonial compulsion and these tests, if compelled would amount to compulsion to make a statement against himself / herself and therefore, hit by Article 20(3) of the Constitution of India. Now, what is the Narco Analysis Test. In the Narco Analysis Test, the subject's imagination is neutralized and reasoning faculty affect by making him semi-conscious. The subject is not in a position to speak up on his own but can answer specific and simple questions. In this state it becomes difficult for him to lie and his answers would be restricted to facts he is already aware of.

The said test is conducted by administrating 3 gms of Sodium Pentathol or Sodium Amytal dissolved in 3000 ml of distilled water and depending on the persons's sex, age, health and physical condition. This mixture is administered intravenously along with 10% of dextrose over a period of 3 hours with the help of an anaesthetist. The subject is then interrogated by the Investigating Agency in the presence of the doctors and as stated above, the revelations made during this stage are recorded in both in video cassettes and the report prepared by the experts is used in the process of collecting evidence and to find out the truth and to further investigate into the crime. It is the user of the statement recorded during the course of the aforesaid tests as evidence against the accused the question with regard to protection under Article 20(3) of the Constitution of India is required to be considered. As rightly observed by the Bombay High Court in case of ***Ramchandra Ram Reddy*** (supra) in order to invoke Article 20(3) of the

Constitution of India, the following things must happen.

1. There should be formal accusation of commission of any offence.
2. The accused of such formal accusation should be compelled to make a statement.
3. The statement so compulsorily made or evoked or provoked is incriminating to the accused or maker thereof.
4. Result of such statement must be a testimony with these ingredients as even though Article 20(3) are established, the protection under testimonial compulsion will come into operation.

Thus, such statement recorded during the course of the Narco Analysis Test will attract bar of Article 20(3) only if it is inculpating or incriminating the person making

it and the said protection / guarantee is required to be considered at the stage when the Investigating Agency seeks to introduce such statement as evidence. Therefore, at the stage of conducting / performing the Narco Analysis Test, the bar / protection guaranteed under Article 20(3) of the Constitution of India is not required to be considered and this is not the stage, at which, the protection guaranteed under Article 20(3) of the Constitution of India is required to be considered.

17. As stated above, when after exhausting all the possible alternatives to find out the truth and nab the criminal / accused and when it is found by the prosecuting agency that there is no further headway in the investigation and they are absolutely in dark, there is a necessity of such a test. On the basis of revelations and/or the statement recorded while conducting / performing the Narco Analysis Test, the prosecuting agency may have some clues which would further help and/or assist

the Investigating Agency to further investigate the crime and at this stage, there will not be any bar of Article 20(3) of the Constitution of India and merely conducting / performing of a Narco Analysis Test on the accused, the protection guaranteed under Article 20(3) of the Constitution of India is not violated. As stated above, only and only at the stage when the prosecuting agency is likely to use such statement as evidence and if it is inculpating and incriminating the person making it, it will attract the bar of Article 20(3). As rightly observed by the Bombay High Court in case of ***Ramchandra Ram Reddy*** (supra) whether the statement made during the course of the aforesaid test is inculpating or incriminating the person making it, can be ascertained only after the test is administered and not before. Thus, by conducting / performing the Narco Analysis Test itself would not tantamount to compulsive testimony or testimonial compulsion and the same would not amount to violation of Article 20(3) of the Constitution of India and

if the statement recorded during the course of the aforesaid test is used against the accused, enough protection exists in the Criminal Procedure Code and / or Indian Evidence Act and recourse to which can be taken as and when the Investigating Agency seeks to produce such statement as evidence and merely on apprehension and/or presumption that the said statement could be used by the Investigating Agency against the person making it that by itself is no ground not to permit the Investigating Agency to conduct / perform the Narco Analysis Test upon the accused, more particularly, when the same is needed for the purpose of finding out the truth and to nab the criminal / accused who have committed offence and when the Investigating Agency is absolutely in dark. Under the circumstances, there is no substance in the contention / submission of the petitioner / accused that conducting / performing of the Narco Analysis Test by itself would be taking away the protection guaranteed under Article 20(3) of the Constitution of

India.

18. So far as Brain Mapping Test is concerned, it is also known as P-300 test. What is the Brain Mapping Test is already discussed hereinabove. What is received at the conclusion of such test is indication of the fact that the accused or the suspect does have or is in possession of knowledge about the subject on which he was questioned. There no verbal response from the witness. There is no statement coming out of this voluntarily test and the consequences which come out of such test is not a statement and therefore, there would not be bar of Article 20(3) of the Constitution of India so far as Brain Mapping Test is concerned.

19. There is another reason also in favour of the prayer of the prosecuting agency for conducting / performing the aforesaid two tests. Under the provisions of the Criminal

Procedure Code, the prosecuting agency is statutorily authorized to investigate the crime and to find out the truth and to reach to the accused persons who have committed serious offences, detail investigation is required. Investigating Officer is the master of the investigation and nobody can restrain and/or interfere with the investigation carried out by the Investigating Officer, not even the Magistrate till an appropriate report is submitted by the Investigating Officer as contemplated under the provisions of the Criminal Procedure Code. Thus, considering the various provisions under the Criminal Procedure Code right from sections 156 to 159 and other related provisions, collection of evidence by the police officer is permitted under the Law. Conducting the aforesaid tests on accused is to be considered as process of collection of such evidence by the Investigating Agency. The aforesaid two tests are scientific methods in furtherance of the investigation. The field of criminology has expended rapidly and new

techniques and methods are used for committing the crimes and offences and the demand for supplemental methods of detecting deception and improving the efficiency of interrogation have increased concomitantly. Thus, aforesaid tests for criminal interrogation is a valuable technique which would help the Investigating Agency to further investigate the crime when the Investigating Agency finds itself clueless and there is no further headway in the investigation. The Investigating Agency cannot be prevented to interrogate the accused at the stage of investigation and restraining the Investigating Agency to further investigate the crime through the aforesaid two tests would tantamount to interfere with the right of the Investigating Agency to investigate the crime of which it is statutorily authorized.

20. Now, it takes me to the next question whether before conducting / performing aforesaid two tests, the consent of the subject is required ? In other words, whether in

absence of consent of the accused person, the aforesaid two tests are permissible ? As held merely conducting of or performing of the aforesaid two tests on the accused would not take away the protection guaranteed under Article 20(3) of the Constitution of India and the said aspect is not required to be considered at the time of performing / conducting the aforesaid two tests and only when the statement which has been recorded during the course of the Narco Analysis Test, if it is used against the person as evidence at that stage, the same is required to be considered. Therefore, the question of consent at the stage of conducting / performing the aforesaid two tests is not required to be considered. As stated hereinabove, conducting / performing of the aforesaid tests is a part of investigation and for the investigation by the Investigating Agency the consent of the accused is not required, otherwise the Investigating Agency will not be in a position to further investigate the case, if the consent of the

accused is required. At this stage, it is also required to be noted that the accused has not allegedly come forward with the truth and therefore, scientific tests are resorted to by the Investigating Agency. When the accused / person has not told the truth during the investigation, naturally, that accused / person would not be voluntarily giving consent for the aforesaid tests as he is always apprehensive that if the aforesaid two tests are conducted than the same might go against him therefore, he is bound to not give consent. Even it is not expected from a person / accused to give consent for the aforesaid two tests when he has not come forward with the truth. As stated above, the aforesaid two tests are the scientific methods of investigation and are the part of investigation. There is no provision under the Criminal Procedure Code to have the consent of the accused before or during the investigation. It is also to be noted that before subjecting the accused to Narco Analysis Test his / her mental fitness will be

ascertained and thereafter only accused will be subjected to Narco Analysis Test. The dosage level required to take a person to the hypnotic stage is found to be 3 – 4 times smaller than those required for stages beyond. Therefore, this low concentration of the drug used in the said test will not have any adverse effect on any system of the body. Necessary precautions are always taken by the medical experts at the time of examination and the doctors and anaesthetists and the experts are present at the time of conducting / performing such test. Under the circumstances, the contention on behalf of the petitioner – accused that before conducting / performing the aforesaid two tests, the consent of the accused person who will be subjected to the aforesaid tests is required cannot be accepted and the answer to such question is in negative.

21. Now, so far as reliance placed upon the Law Commission's Report as well as the guidelines issued by the National Human Rights Commission

are concerned, it appears that the question which has been considered by the Law Commission was that whether the aforesaid tests should be made compulsorily for which a provision is to be made in the Criminal Procedure Code and if such a provision is made in the Code, the protection guaranteed under Article 20(3) of the Constitution of India would be violated or not. On considering the entire Report of the Law Commission, it appears that need of the Investigating Agency to further investigate the crime and to find out the truth has not been considered and has not been focused. This Court has already discussed hereinabove the need for such a test by the Investigating Agency and whether conducting / performing of the aforesaid tests by itself would violate the constitutional protection guaranteed under Article 20(3) of the Constitution of India. So far as reliance placed upon the guidelines issued by the National Human Rights Commission is concerned, as discussed hereinabove, while conducting / performing the aforesaid two tests

due care is always taken by the medical experts and before subjecting the accused to Narco Analysis Test, his / her medical fitness will be ascertained and necessary care and precautions are taken by the medical experts at the time of examination.

22. So far as the decision relied upon by the learned Senior Advocate appearing on behalf of the petitioner – accused are concerned, in view of the the discussion hereinabove and the subsequent amendment in the Criminal Procedure Code, the aforesaid decisions would not be helpful to the petitioner – accused.

23. Now, so far as the contention / grievance made by the learned advocate appearing for the petitioner that though it was pointed out before the Revisional Court that the identical question is pending before the Hon'ble Supreme Court, which is referred to the Larger Bench and the same has not been dealt with and

considered by the Revisional Court is concerned, at the outset, it is to be noted that such a grievance is not made in the present petition. There are no pleadings in the petition that the aforesaid submissions were in fact made but the same has not been considered and/or dealt with the by the Revisional Court. It might be that in the revision memo such a ground might have been taken but many a times so many grounds are taken in the memo but they are not argued and/or submissions are not made before the Court. If such a contention is raised and argued before the learned Revisional Court and the same has not been dealt with, the petitioner ought to have made a ground in the petition that such a submission though argued is not considered. Thus, it can be presumed that such a contention / submission might have been raised in the memo of revision but might not have argued. It is true that whenever submissions are made and/or contentions are raised, the Court is required to consider and deal with the same and it must be reflected in

the judgment that said submissions / contentions has been dealt with. As stated above, in absence of any grievance made in the petition, the contention of the petitioner cannot be accepted.

24. As stated above, Shri Nanavati, learned Senior Advocate appearing for the petitioner – accused has also tried to submit that as the question is pending before the Hon'ble Supreme Court and is referred to the Larger Bench, performance of the aforesaid two tests on the petitioner should be refused and/or the present petition be kept pending. As stated above, thrice this Court adjourned the matter at the instance of the learned Senior Advocate appearing on behalf of the petitioner so as to enable the petitioner to move an appropriate application before the Hon'ble Supreme Court for transfer of the present proceedings and on the last occasion it was also agreed by the learned counsel appearing on behalf of the petitioner that if no orders are obtained, he

will proceed further with the matter and make submissions on merits. As stated above, it is reported that the petitioner is not desirous of submitting an appropriate application for transfer before the Hon'ble Supreme Court and that is how this Court has taken up the matter and considered the same on merits. It is also required to be noted that conducting / performing of the aforesaid two tests are timely requirement, more particularly during the course of the investigation and even if after the period of 6 months or so and / or after a long time, the said tests are permitted to be performed, the purpose for which the said tests are required would be frustrated. If the said tests are not permitted to be performed at an appropriate time and stage, the same would defeat the purpose for which the said tests are required to be performed i.e. to find out the truth to reach the real culprit and to further investigate the case. As stated above, there are so many proceedings pending in the State involving serious offences like Saurabuddin

encounter case and the murder of his wife Kausharbibi and others. Where the questions with regard to conducting / performing of the aforesaid two tests are involved and in some cases the Investigating Agency have found themselves in dark and clueless, there is necessity of conducting the aforesaid tests and the proceedings are pending at different stages before the different Courts i.e. either at the stage of learned Magistrate and/or Revisional Court and/or before this Court and therefore, this Court has considered the case on merits.

25. Now, so far as the contention on behalf of the petitioner that as such, the petitioner is charged only for the offences under sections 212 and 506(2) of the Indian Penal Code which are trivial in nature and therefore, looking to the offences alleged, such a drastic tests are not required and the contention that the nature of offences alleged is also relevant consideration is concerned, it is required to be noted that the allegations against the

petitioner are that the petitioner has committed offence of harboring and sheltering the accused persons who have committed murder and rape of a girl and that the further allegations are of criminal incrimination and abetment, therefore, the question is not of harboring and/or sheltering an ordinary accused but what is important is to which accused the petitioner has harbored and sheltered. Therefore, the contention on behalf of the petitioner that as the allegations against the petitioner are only for the offences under sections 212 and 506(2) of the Indian Penal Code and the nature of offences are such which does not warrant such tests, cannot be accepted. Learned counsel appearing on behalf of the petitioner is right in making submissions that the nature of offence alleged is a relevant consideration and the method adopted in commission of crime by one or more accused is also a relevant consideration for such tests.

26. For the reasons stated above, it cannot be said that the learned Magistrate has committed any error and/or illegality in allowing the application of the prosecuting agency for conducting of the Narco Analysis Test and Brain Mapping Test upon the accused. Consequently, the learned Revisional Court has also not committed any error in confirming the said order. Under the circumstances, the present petition is required to be dismissed which is filed under Article 227 of the Constitution of India as there is no jurisdictional error much less an error of law committed by both the Courts below. Accordingly, this petition is dismissed.

[ M.R.Shah, J.]

**FURTHER ORDER**

At this stage, the learned Senior Advocate appearing on behalf of the petitioner has prayed to stay the order passed by this Court.

However, considering the need for conducting / performing the aforesaid two tests and those tests are required timely and for the reasons stated above, the prayer of the petitioner to stay the present order is rejected. Even otherwise, it is not that immediately the aforesaid two tests are likely to be conducted / performed upon the petitioner.

[ M.R.Shah, J.]

kdc